SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 900

LEE HENSLEE, Superintendent of the Arkansas State Penitentiary ..... *Petitioner*

v.

CLARENCE STEWART, JR. ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AND

APPENDICES

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SUPREME COURT OF THE UNITED STATES

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No. _____

LEE HENSLEE, Superintendent of the Arkansas State Penitentiary ..... *Petitioner*

v.

CLARENCE STEWART, JR. ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Lee Henslee, Superintendent of the Arkansas State Penitentiary, by his counsel, the Attorney General of Arkansas, petitions this Count and prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit affirming the decision of the United States District Court to conditionally grant respondent a writ of habeas corpus from a conviction of first degree murder.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, styled *Stewart* v. *Henslee*, is reported at 206 F. Supp. 137, was affirmed by decision of the Court of Appeals for the Eighth Circuit (Appendix B, infra, p. 14) which has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 11, 1963. Appendix B, infra, p. 14. A petition for rehearing was timely filed by petitioner and was subsequently denied on February 6, 1963. Appendix B, infra, p. 14. A motion for stay of mandate pending this application for a writ of certiorari was then presented to the Circuit Court of Appeals and was granted on February 19, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED

1. Was the method of choosing the petit jury panel which convicted respondent contrary to the principles attendant to constitutional jury selection as enunciated by the Supreme Court of the United States.

2. Whether the provisions of state statutes, the use of composite of poll tax records, and the practice of designating the race of electors are of such significance to condemn petit jury panels.

3. Is the composition of a jury panel by proportion to all ethnic groups of a community a mandatory criteria.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States.

ARKANSAS STATUTES INVOLVED

The statutory provisions involved are Arkansas Statutes §§ 3-104.2, 39-208 and 3-227 which pertain to the qualifications of electors and jurors. These enactments are printed in Appendix A, infra, pp. 11-12-13.

STATEMENT

The respondent, a Negro, was charged with the crime of first degree murder by a felony information in Pulaski County, Arkansas. The circumstances of the crime, although not in issue here, sustained that respondent brutally murdered a junkyard man while in commission of a robbery by fatally stabbing his victim nineteen times with a hunting knife. The overwhelming evidence submitted at the trial resulted in a verdict of guilty and sentence of death.

The judgment of the trial court was affirmed and rehearing was denied. *Stewart* v. *State*, 233 Ark. 458, 345 S.W. 2d 472. Certiorari was subsequently denied by this Court. *Stewart* v. *State*, 368 U.S. 935.

Thereafter, respondent sought relief in the United States District Court, Eastern District of Arkansas, Western Division, by a petition for a writ of habeas corpus. The basis of respondent's application was deprivation of constitutional rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. It was specifically asserted, *inter alia*, that members of his race were systematically limited in the selection of the petit jury panel.

The decision of the district judge (Appendix B, infra, p. 14) reveals that a careful analogy was made of pertinent facts of this case and those noted in *Bailey* v.

Henslee, 8 Cir., 1961, 287 F. 2d 936, cert. den. 368 U.S. 877, and ordered, in essence, that the State of Arkansas was to retry respondent within a specified time or release him from custody.

Petitioner perfected an appeal, but on review the Circuit Court of Appeals, although noting some distinctions, affirmed the findings and approved the application of authority of the hearing judge.

The basis of the adverse rulings was that the presence of several facts, taken in aggregate, established a prima facie case of limitation of Negroes on the jury panels which withstood rebuttal. This result was reached after it was concluded, *inter alia*, that there was present a pattern of race selection, an exclusion of Negroes from the alternate and special panels, and a device for race identification. The decisions below were clearly erroneous, for the evidence (Appendix C, infra, pp. 27-28) clearly refuted the first two propositions, and the "device" was founded on voter registration which was remote and not susceptible to abuse (Appendix A, infra, pp. 11-12-13).

Furthermore, certain Arkansas statutes which govern the qualifications of electors and veniremen, although not expressly declared unconstitutional by the Circuit Court of Appeals, were implicated to such a degree to shadow doubt on their validity.

REASONS FOR GRANTING THE WRIT

1. Initially, it must be determined if the method of choosing the petit jury panel which convicted the respondent was contrary to the principles attendant to constitutional jury selection as enunciated by the Supreme Court of the United States. If the case of *Bailey* v. *Henslee*, *supra*, gained notoriety or found special significance in

the annals of American jurisprudence, then most assuredly that prominence was due to the most extreme conclusion of deprivation of constitutional rights by jury selection. The acme reached by *Bailey* was short lived for it was surpassed in factual aspects by the case at bar. This is true notwithstanding that both *Bailey* and the decision of the court below are directly in conflict with the many sound and comprehensive pronouncements of this Court concerning the subject of racial discrimination in the selection of juries.

A review of the factual circumstances of the case at bar confirms its unique status.

Although respondent's counsel dwelled and emphasized proportionate representation during examination of the jury commissioners, it is evident from their testimony that such was not the criteria, but rather the selection of a fair and impartial jury (R.32-33). Moreover, the commissioners were eminently qualified and well acquainted in the community (R.34-37). One commissioner identified himself as a member of a minority group (R.35). Cf. *Smith* v. *Texas*, 311 U. S. 128 and *Cassell* v. *Texas*, 339 U.S. 282.

The result of the commissioners' efforts confirm their honest intent and defy criticism. See Appendix C. infra, pp. 27-28, composition of jury panels for March 1960 Term. Three of the 24 member regular panel and 5 of 50 called for the special panel were Negroes. Cf. *Akins* v. *Texas*, 325 U.S. 398; *Bailey* v. *Henslee, supra.*

2. Are the provisions of state statutes, the use of composite poll tax records, and the practice of designating the race of electors of such significance to condemn petit jury panels?

The statutory provisions in controversy are Arkansas Statutes §§ 3-104.2, 39-208, and 3-227 (Appendix A, infra, pp. 11) which pertain to the qualifications of electors and jurors. It must be noted that these enactments were not expressly declared unconstitutional by the Circuit Court of Appeals, but such emphasis and implication as to the application of these laws in regard to jury selection requires clarification and consideration. The practice of the jury commissioners to designate race on the jury list was noted and specific reference was made to the pertinent and controlling legislation: Appendix B, infra, p. 14. The Court then concluded its opinion by favorably quoting from *Bailey*:

> "... Here there appears to be a definite pattern of race selection; here there is a device for race identification with its possibility of abuse . . ." (Appendix B, infra, p. 14).

The rationale of the court below on this subject is clearly in conflict with the decisions of this Court and is void of support in either fact or logic. Moreover, the circuit courts of Arkansas and their respective jury commissioners face a dilemma if the designation of an elector's race is to have persuasive force in nullifying a verdict.

It was recognized in *Brown* v. *Allen*, 344 U.S. at 473, that states have the prerogative of determining the qualifications of jurors. In Arkansas, as is common in other states, a juror must possess, among other things, the qualifications of an elector. Ark. Stats. § 39-206 (1947); see footnote 22 *Brown* v. *Allen*, *supra*, at p. 472. Thus, each juror is required to have a current poll tax receipt. Ark. Stats. §§ 39-208, 3-104.2 (1947).

At the time of purchase of poll tax, each person is required to give information, among other things, of his color. Ark. Stats. § 3-227 (1947). The obvious purpose of requiring this and other information regarding the applicant is to assure a conclusive means of identification of the particular person when he casts his ballot. The practice of identifying persons by color has won approval by usage in almost every conceivable means of compilation.

The jury commissioners must properly examine the composite of poll tax payers in the county to verify poll tax holders as an initial step in the final selecting of a statutorially qualified juror. It is absurd to conclude that a device for race identification which has as its basis voter registration is, in itself, of evidentry value in determining if there is discrimination in selecting the jury panel.

The Circuit Court of Appeals held that it was fatal to transpose the race of a selected juror from the poll tax records to the jury list. The vice of the practice was expressed as "its possibility of abuse." The court below was perhaps relying on *Norris* v. *Alabama*, 294 U.S. 587, and *Avery* v. *Georgia*, 345 U.S. 559, but even a cursery study of those cases reveals substantial distinctions which revokes analogy between the practice and results of the Pulaski Circuit Court. In the absence of a showing of abuse, the decision below is diametrically opposed to the holding in *Brown* v. *Allen*, 344 U.S. 443, at 480.

There is but one reason why colored persons are designated on the jury list in Pulaski Circuit Court, and that is to maintain evidence of participation of Negroes on the panels. If this practice was abolished either vol-

untarily or by decision of this Court, then the sole means and resources of information of Negro participation available to court officials and interested parties will vanish.

In all deference, respect, and sincerity, petitioner finally submits that once a venireman has been selected, there is no practical means to discriminate by identification of color. The juror's complexion cannot be concealed at the bar of the court.

3. It is well established principle that a venire is not required to be composed in proportion to all ethnic groups of the community. Notwithstanding this fact, both the district judge and the Circuit Court of Appeals expressly considered the composition of the panels which tried respondent and was also expressly cognizant of numbers of Negroes who had served on juries during the years prior to respondent's trial. The action of the court below was clearly contrary to *Brown* v. *Allen*, supra, 344 U.S. at 479, where it was aptly stated: "Former errors cannot invalidate future trials."

Traditionally, cases involving discrimination in jury selection have been most dramatically illustrated by resorting to a statistical analysis showing the proportion of Negroes serving on the panel as opposed to those eligible as jurors. This is not surprising for the ratios possess a quite convincing quality. However, while the praises of such rationale may be sung, there has appeared a discordant factor of systematic limitation. Thus, respondent wields a double edged sword of exclusion and inclusion. Stated otherwise, learned jurists have declared that race has no place in the selection of a jury and the commissioners should discharge their duties without regard to proportion or disproportion.

There is no fault in such theory, but the pure practice will produce disasterous results. The natural reaction of a reviewing court confronted with an entire jury panel of Caucasians would be that a "prima facie case of discrimination in the selection of juries has been established" even though under the doctrine an all white jury would not only be possible, but quite probable in a community where Negroes make up only a small percentage of the population. Moreover, if the jury commissioners rebutted the prima facie evidence by the honest testimony that race was not considered, the hearing court would logically reply that "there is testimony as is usual in these cases that this (race) was of no persuasion as far as the jury commissioners were concerned."

Faced with these realities, jury commissioners are necessarily dedicated to the end that some Negroes must serve on the jury, but the record in this case is void of evidence of limitation of the number of Negroes on the panels in the March 1960 term. Furthermore, petitioner deems it imperative to state that an exhaustive search of decisions fail to reveal one reversal where the percentage of participation of the accused's race was as substantial as the case at bar.

4. Settlement of the matter presented herein is plainly to the public interest. The entire system of judicial administration in Arkansas and perhaps other states is now confused and thwarted to a significant extent.

This case is perhaps the most important and of far-reaching effect to come from the State of Arkansas in many years. It not only touches upon state statutes of long standing governing the method of voter registration and jury selection, but also establishes a factual determi-

nation concerning the composition of juries which was heretofore incomprehensible. Furthermore, the decision below in conjunction with *Bailey* v. *Henslee*, 8 Cir., 1961, 287 F. 2d 936, *supra*, create factional conclusions of discrimination in the First Division Pulaski Circuit Court which entitles each convicted defendant of that court to a reversal regardless of the rebuttal testimony submitted by the State. This is in direct conflict that each case must stand upon its own merits. *Patton* v. *Mississippi*, 332 U.S. 463 at 466.

If this case is permitted to remain in its present form, petitioner and the State of Arkansas reasonably anticipate a deluge of applications to the district court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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State of Arkansas

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APPENDIX A

ARKANSAS STATUTES CITED

SECTION 3-104.2

It shall be unlawful for any person to cast a ballot in any election unless such person shall have previously paid a Poll Tax as herein provided.

SECTION 3-227 (in part)

• • • It shall be the duty of each elector, at the time of payment of his poll tax, to state, and it shall be the duty of the collector to record and certify in his receipt evidencing the payment of such poll tax, the color, residence, postoffice address (rural route, town or street address), voting precinct, and school district, of such person at the time of the payment of such tax, and all poll tax receipts not containing such requirements shall be void and shall not be recognized by the judges of election; provided, however, it shall not be necessary to state or have certified the street address of any such person in cities and towns where the numbering of houses is not required by the ordinances thereof.

The certified lists required by section 3 of Act 320 of 1909 [§ 3-118] shall contain, in addition to the name of the person paying such poll tax, his color, residence, postoffice address (rural route, town, or street address where by ordinance the numbering of houses is required), the school district and voting precinct, and such list shall be arranged in alphabetical order, according to the respective voting precincts. The county election commissioners shall supply the judges of primary elections with printed copies of such lists. • • •

SECTION 39-206

They shall select from the electors of the county sixteen (16) persons of good character, of approved integrity, sound judgment and reasonable information, to serve at the next term of the court as grand jurors, and when ordered by the court, shall select such other number as the court may direct, not to exceed nine (9) electors, having the same qualifications, for alternate grand jurors, and make separate lists of the same, specifying in one [1] list the names of the sixteen (16) persons selected as grand jurors, and certify the same as the list of grand jurors; and specifying in the other list the names of the alternate grand jurors, and certifying the same as the list of alternates; said grand and alternate grand jurors shall be selected from all parts of the county. Provided further that in the event it becomes evident to the court that the list of alternate grand jurors should be supplemented with additional names the court may recall the jury commissioners which selected such panel of grand jurors and alternates for the purpose of supplementing the list of alternate grand jurors with such number of persons as alternates as the court deems necessary. In the event of disqualification of [or] unavailability of one [1] or more of such jury commissioners the court may appoint one [1] or more jury commissioners in lieu thereof.

SECTION 39-208

The commissioners shall also select from the electors of said county, or from the area constituting a division thereof where a county has two [2] or more districts for the conduct of circuit courts, not less than twenty-four (24) nor more than thirty-six (36) qualified electors, as the court may direct, having the qualifications prescribed in Section 39-206 Arkansas Statutes 1947 Annotated to serve as petit jurors at the next term of

court; and when ordered by the court, shall select such other number as the court may direct, not to exceed twelve [12] electors, having the same qualifications, for alternate petit jurors, and make separate lists of same, specifying in the first list the names of petit jurors so selected, and certify the same as the list of petit jurors; and specifying in the other list the names of the alternate petit jurors so selected, and certifying the same as such; and the two [2] lists so drawn and certified, shall be enclosed, sealed and indorsed "lists of petit jurors" and delivered to the court as specified in Section 39-207, Arkansas Statutes 1947, Annotated for the list of grand jurors.

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,148. September Term, 1962.

Lee Henslee, Superintendent of Arkansas State Penitentiary, Appellant, v. Clarence Stewart, Jr. Appellee,	Appeal from the United States District Court for the Eastern District of Arkansas.

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Arkansas; and was argued by counsel.

On Consideration Whereof, it is now here Ordered and Adjudged by this Court that the Order of the Said District Court appealed from, dated June 12th, 1962, in this cause be, and it is hereby, affirmed.

And it is further Ordered by this Court that the Superintendent and the State are now granted still further time in which to retry Stewart to and including the expiration of one hundred twenty (120) days from the date of the filing of this Court's mandate with the United States District Court for the Eastern District of Arkansas. If this amount of time is deemed then to be unreasonably short, any application by either party for additional time will be directed to the District Court.

January 11, 1963.

Order entered in accordance with
Per Curiam Opinion:
Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17148 September Term, 1962.

Lee Henslee, Superintendent of Arkansas State Penitentiary, Appellant,

v.

Clarence Stewart, Jr. Appellee,

Appeal from the United States District Court for the Eastern District of Arkansas.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

February 6, 1963

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

CLARENCE STEWART, JR. ..... *Petitioner*

v. No. LR 62 C 22

LEE HENSLEE, Superintendent of Arkansas State Penitentiary ..... *Respondent*

MEMORANDUM OPINION

Clarence Stewart, Jr., a negro, was charged by information filed by the prosecuting attorney for Pulaski County, Arkansas, with murdering William N. Caldwell on January 9, 1959. He was tried by a jury at the March 1960 term in the Circuit Court, First Division, Pulaski County, Arkansas, found guilty of first degree murder, and in due time was sentenced to death.

This judgment was affirmed by the Supreme Court of Arkansas, *Stewart* v. *State*, ___ Ark. ___, 345 S.W. 2d 472, and on December 4, 1961, certiorari was denied by the Supreme Court of the United States, 368 U.S. 935. On February 5, 1962, Stewart sought relief in the federal court by petition for writ of habeas corpus filed in the United States District Court for the Eastern District of Arkansas, Western Division. On the same date an order was issued by that court requiring the Superintendent of the Arkansas State Penitentiary, respondent herein, to show cause why writ of habeas corpus should not issue, and the execution of Stewart was stayed.

A hearing on the petition for writ of habeas corpus was held in the district court on February 19, 1962. Petitioner Stewart was present and was afforded full opportunity to be heard and to offer testimony.

In seeking discharge from custody petitioner contends that his conviction was obtained as a result of deprivation of his Constitutional rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Petitioner filed a written amendment to his petition and at the hearing counsel orally amended further. I believe that petitioner's claims are best expressed in the language of his counsel in their brief. They are:

> "(1) Members of petitioner's race were intentionally, deliberately and systematically limited in the selection of petit jury panels.
>
> "(2) Petitioner is a Negro and members of his race were deliberately and intentionally discriminated against in the selection of petit jury panels.
>
> "(3) The jury commissioners allowed race to be considered as a factor in the selection of the petit jury panel.
>
> "(4) The jury commissioners made no special effort to acquaint themselves with Negroes who were qualified for jury services.
>
> "(5) The defendant's confession was made without benefit of counsel."

The question of the guilt of petitioner is not an issue. It is, therefore, unnecessary to discuss the facts and circumstances attending commission of the crime. They are reported in *Stewart* v. *State*, supra.

The question of whether members of the Negro race were deliberately and intentionally limited and excluded in the selection of petit jury panels in the Circuit Court, First Division, Pulaski County, Arkansas, in violation of the Federal Constitution was considered in detail by the United States Court of Appeals for the Eighth Circuit in *Bailey* v. *Henslee*, March 17, 1961, 287 F.2d 936. In that case the court discussed in detail the racial composition of juries in that court from 1953 through the March term in 1960, which is the term at which Stewart was convicted. We regard that case as controlling, therefore, in passing upon this petition.

At the outset we should observe that the racial composition of juries in the First Division of the Pulaski Circuit Court introduced in the record in this case includes the years 1940 through March 1960, while the Bailey case included similar statistics from 1953 through March 1960.

No question of *exclusion* of Negroes is involved. As stated in *Bailey*, there has been representation of the Negro race on the regular petit jury panel on each of the terms which have come and gone in the Pulaski County Circuit Court, First Division, from March 1953 through March 1960. The actual number of Negroes has varied from one to three. There were 31 instances of a Negro juror on the regular panel of the fifteen terms during that seven and one-half year period. At each term, in addition to the regular panel of 24 petit jurors, an alternate panel of twelve was called. During that period no Negroes appeared on the alternate panels. In addition, twenty-nine Negroes served on special panels used in that court during that same period of time, and of that number five Negroes out of fifty special petit jurors were called at the term when Stewart was tried in March 1960.

We come, then, to the question of whether members of petitioner's race were deliberately and intentionally limited in the selection of petit jury panels. *Bailey* made nine factual findings, pp. 946, 947, which, it is said "(L)ead us to the conclusion that a prima facie case of limitation of members of the Negro race in the selection of this defendant's petit jury panel was established, that the State did not rebut it, and that the District Court's conclusion to the contrary was clearly erroneous. Here there appears to be a definite pattern of race selection; here there is a device for race identification with its possibility of abuse; here there is exclusion from the alternate panels and from the special panels actually used; here there is an element of recurrence of the same Negro names; and here there is the additional factor, for what atmosphere it may provide, of exclusion from the civil divisions' panels."

We believe that the facts in this case may best be compared with those in *Bailey* by setting forth the nine factual findings in *Bailey* and comparing them with the facts developed at the hearing of this petition. The paragraphs numbered 1 through 9 are quotations from *Bailey*. The paragraphs numbered 1a, 2a, etc. reflect facts developed in this case relating to the same subject matter.

"1. Since 1939 no Negro has ever served on any kind of panel, regular, alternate or special, in the Second or Third Divisions[1] of the Pulaski County Circuit Court. A fact of this kind, as has been noted above, would support a conclusion that a prima facie case of discrimination in the selection of juries in these civil divisions has been established."

---

[1] These two divisions try only civil cases.

1a. There is no proof in the record of this case in regard to the composition of juries in these civil divisions.

"2. The First Division's panels of alternates, from 1952 to 1960, with one possible exception, contained no Negro name. Here again it can be said that this fact creates an unrebutted prima facie case of discrimination in the selection of these alternates."

2a. The proof in this case reflects that the First Division's panels of alternates from 1952 to 1960 contain no Negro names. In 1941 one Negro was an alternate juror; in 1946, one; in 1951, three for the two terms; otherwise, no Negroes served on alternate jury panels during the years 1940 to 1952, inclusive.

"3. The five special panels assembled for the March 1956 term in the First Division, which contained an aggregate of approximately 450 names, included, according to the stipulated Exhibit 1, the name of no Negro."

3a. Of course, this particular point is not so important in our case because Stewart was tried at the March 1960 term. At that term, of the 50 special jurors called, 5 were Negroes.

"4. Fourteen of the persons on the defendant's own petit jury panel of 37 names came from those two special panels consisting exclusively of white persons."

4a. According to the testimony, at the March 1960 term, with which we are primarily concerned, there were three Negroes on the regular panel of 24 jurors, none on the alternate panel of 12, and five on the special panel of 50. Exhibit B, which purports to be the list of special

jurors, includes D. B. Lacefield as one of the five Negro special jurors. D. B. Frederick, deputy circuit clerk, in his testimony, included the name of Lacefield as one of the three Negroes on the regular panel. There is no explanation for this apparent duplication. Although the record is not entirely clear, it appears that Stewart's jury panel included the regular, the alternate, and at least a portion of the special panel.

"5. Over the years presented no more than 4 Negroes appeared in any regular panel of 24 persons. At the most (6 of 15 times) therefore, Negroes have represented one-eighth of the total. This is a little less than what the evidence seems to show, at least for 1954 and 1955, to be the proportion between the races for persons holding the qualifying poll tax receipts. We recognize, of course, that mere lack of identity in proportions is not in itself unconstitutional."

5a. The evidence shows here that over those years, that is 1953 through March 1960, no more than three Negroes appeared in any regular panel of 24 persons, and at the most (6 of 15 times) Negroes have represented one-eighth of the total. The evidence also shows that Negroes have appeared on the regular panels in each year from 1940 through 1951, inclusive, the numbers ranging from one to six per term except for 1941, the March terms in 1944 and 1945, the September term of 1947, and the two terms in 1952. There were no Negroes on the regular panels for those terms.

There is no evidence in this record as to the proportion between the races for persons holding the qualifying poll tax receipts for 1954 and 1955. Robertson, the Collector of Pulaski County, testified that there were 88,176 poll taxes issued in 1959, the year which would qualify

jurors for the March 1960 term as far as poll taxes are concerned. He said there was no accurate way to determine the percentage issued to colored or white in any one year, that in 1959 colored people bought more poll taxes than they ever purchased in the history of Pulaski County, and this had been true for four years, although in 1959 they purchased in larger numbers. When asked specifically the percentage in 1959, his reply was "It would be just a guess. This is purely and simply a guess, but I would say that last year there was between 20,000 and 25,000 poll tax receipts issued with a 'c' on it." In other years the percentage would be much lower. Back six years ago "there wasn't one out of every fifty."[2]

"6. There is an unexplained and seemingly unusual amount of repetition of the names of Negroes which do appear on the regular panels from 1953 to 1960 and which in the aggregate made up the 31 instances. A. E. Nabors, who was named in September 1955, was named again in September 1957 and in March 1960. D. B. Lacefield, who was named in September 1955, was also named in March 1958 and March 1960 (he had been named, too, in March 1951). Simon Herron, who was named in March 1956, was also named in September 1958. W. E. Hayes, who was named in September 1955, was named again in March 1959. I. S. McClinton, who was named in March 1957, was also named in September 1959 (he had been named, too, in March 1951. Vilma T. Nabors, who was named in September 1956, was the wife of A. E. Nabors.

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[2] Subsequent to the hearing in this case, the Arkansas State Auditor released through the press February 1, 1962, statistics showing poll tax holders in the various counties in the state for several years by race. It reflected that Pulaski County in 1959 had 81,184 poll tax holders, of which 69,169 were white and 12,015 were colored, or a ratio of slightly more than six to one. These figures, of course, are not a part of the record in this case.

The 31 names for the 1953-60 period thus come down to only 24 different persons and 2 of these are husband and wife."

6a. The record in this case is identical.

"7. The Pulaski County poll tax receipts were given racial marks. They contained a 'C' when the holders were known to be colored and a 'W' when they were known to be white. Where race was unknown, as was often the case when payment of the tax was made by mail, they were marked 'W'."

7a. This is also true in this case. Arkansas law requires that poll tax holders be identified by color. Ark Stat. § 3-227.

"8 The jury commissioners, except, perhaps, for for two terms, themselves identified names of Negroes on the lists by the designation '(C)' or '(Col)' or '(Colored)'. Why this was done does not appear. There is testimony, as is usually the situation in these cases, that this was of no persuasion so far as the jury commissioners were concerned."

8a. It is true in this case that for the same period of time the jury commissioners identified names of Negroes on the lists.

"9. The testimony of the jury commissioners as to their efforts to ascertain the names of qualified Negroes leaves much to be desired."

9a. In *Bailey* the substance of the testimony of the jury commissioners was they made no special effort to include Negro jurors nor to exclude them. In this case

Commissioner Granoff said that no special investigation was made of jurors but that an attempt was made to select people who would be best qualified. He wanted to have some Negroes on the panel so "they would have a 'say' in the government of our county." It was desired to give Negroes a proportionate representation. Commissioner Branch testified that a special effort was made to see that there were some Negroes on the panel. Enough were picked, according to him, to give them representation in the "county government".

There is a detailed discussion in *Bailey* of the cases that have dealt with this problem, and there is no reason to repeat that analysis here.

In summary, there appears little difference in the record in this case from that in *Bailey*. This is not surprising because, as stated above, the record in *Bailey* included the petit jury panels in the Pulaski County Criminal Division from March 1953 through March 1960.

It is true that the first point set out by *Bailey*, that since 1939 no Negro had served on any of the civil panels in Pulaski County, does not appear in the record in this case. The Court of Appeals did not appear to give this point particular emphasis. It was the last of the facts stated to have influenced the court in rendering its decision, and it was thus characterized in *Bailey*, " . . . and here there is the additional factor, for what atmosphere it may provide, of exclusion from the civil divisions' panels."

I think we may properly make the observation that the only reason that factor is not present in this record is because petitioner failed to make the showing.

It is true that the commissioners who testified in this case said that they made a special effort to see that Negroes had representation on the jury panels. Unfortunately their efforts still resulted in the pattern of three Negroes on the regular panel of 24, and no Negroes on the alternate panel of 12.

Perhaps the most important difference with *Bailey* is that no Negroes were on the panels of special jurors in that case, while here the commissioners included five Negroes on the special panel of 50, or a ratio of ten percent.

I have come reluctantly to the conclusion, however, that the differences between this record and *Bailey* are not sufficient to avoid the same result reached in *Bailey*, that is, a determination that the procedure followed in Stewart's trial in the method of jury selection does not measure up to the standards of the equal protection clause of the Fourteenth Amendment as interpreted by the United States Supreme Court.

The other issue which petitioner raised dealt with his confession. In view of the decision on the jury question, it is not necessary to pass on this contention.

As also stated in *Bailey*, p. 948, this result does not mean that Stewart need go free, "The State of Arkansas is at liberty to try him again upon the same information by procedure which meets Constitutional requirements."

The State of Arkansas is given seven months from the date this opinion is filed in the office of the Office of the Clerk of this Court to retry Stewart. If, for good cause shown, it becomes impossible or inappropriate to try

him within that period of time, application may be made to this court by either Stewart or the State for a reasonable extension of time.

It is impractical to prescribe an appropriate period of time if this case be appealed, but in such event, we assume the appellate court will make further orders prescribing a time limit which will be suitable under the circumstances.

If Stewart is retried, the court will enter dismissal of Stewart's present petition for release on habeas corpus. If he is not retired within the period prescribed in this opinion, or within such other period of time as may be set by an appellate court, his petition for a writ of habeas corpus will be granted.

Pending a retrial by the State, a stay of execution will issue.

Gordon E. Young, Judge

APPENDIX C

RECORD OF PETIT JURIES OF FIRST DIVISION PULASKI CIRCUIT COURT

The following is a compilation from available records indicating number and composition of petit jury panels (R.24-30.)

Term of Court	Number of Jurors			Number of Negroes		
	Reg.	Alt.	Special	Reg.	Alt.	Special
March 1940	48	24	25	3	0	0
Sept. 1940	48	24	None	1	0	None
March 1941	48	Not shown	None	0	1	None
Sept. 1941	48	24	None	0	0	None
March 1942	72	36	None	2	0	None
Sept. 1942	72	36	None	3	0	None
March 1943	48	24	None	2	0	None
Sept. 1943	48	24	None	1	0	None
March 1944	48	24	Not shown	0	0	Unknown
Sept. 1944	48	24	None	2	0	None
March 1945	48	24	None	0	0	None
Sept. 1945	48	24	Not opened	2	0	Unknown
March 1946	48	24	25	1	1	1
Sept. 1946	48	12	25	4	0	2
March 1947	48	24	25	1	0	0
Sept. 1946 (1947)	36	12	50	0	0	0
March 1948	48	24	None	4	0	None
Sept. 1948	48	24	None	6	0	None
Sept. 1949	48	24	25	4	0	2

March 1950	24	12	34	3	0	0
Sept. 1950	24	12	Not opened	3	0	Unknown
March 1951	24	12	25	2	2	2
Sept. 1951	24	12	50	4	1	4
March 1952	24	12	50	0	0	0
Sept. 1952	24	12	50	0	0	2
March 1953	24	12	50	2	0	0
Sept. 1953	24	12	70	1	0	5
March 1954	24	12	24	1	0	0
Sept. 1954	24	12	50	1	0	0
March 1955	24	12	50	3	0	4
Sept. 1955	24	12	50	3	0	0
March 1956	24	12	450	2	0	0
Sept. 1956	24	12	50	3	0	1
March 1957	24	12	250	3	0	5
Sept. 1957	24	12	108	2	0	5
March 1958	24	12	Missing	1	0	Unknown
Sept. 1958	24	12	50	2	0	0
March 1959	24	12	50	1	0	0
Sept. 1959	24	12	200	2	0	4
March 1960	24	12	Not opened (50)*	3	0	Unknown (5)*

* Exhibit B reveals a special panel of 50 which 5 were Negroes (R.52-54).

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,148

Lee Henslee, Superintendent of Arkansas State Penitentiary, Appellant, v. Clarence Stewart, Jr., Appellee.	Appeal from the United States District Court for the Eastern District of Arkansas.

[January 11, 1963.]

Before VOGEL, BLACKMUN and RIDGE, Circuit Judges.

PER CURIAM.

This is an appeal by the Superintendent of the Arkansas State Penitentiary from an order[1] entered upon the amended petition of Clarence Stewart, Jr., for a writ of habeas corpus.

[1] "The State of Arkansas is given seven months from June 12, 1962, to retry Stewart. If, for good cause shown, it becomes impossible or inappropriate to try him within that period of time, application may be made to this court by either Stewart or the State for a reasonable extension of time.

"If Stewart is retried, the court will enter dismissal of Stewart's present petition for release on habeas corpus. If he is not retried within the time prescribed in this Opinion, or within such other period of time as may be set by an appellate court, his petition for writ of habeas corpus will be granted.

"Pending a retrial by the State, a stay of execution will issue."

Stewart, a Negro then about 21 years of age, was charged, by informatin filed in Pulaski County, Arkansas, with the crime of murder in the first degree. He was convicted by a jury at the March 1960 term of the Circuit Court, First Division, of that county. The jury did not render a verdict of life imprisonment under Ark. Stats. § 43-2153. Stewart consequently received a death sentence. § 41-2227; *Turner* v. *State*, 1955, 224 Ark. 505, 275 S.W. 2d 24, 31.

Stewart appealed his conviction to the Supreme Court of Arkansas. He argued there, inter alia, that his jury panel should have been quashed because of discrimination in its selection. That court, nevertheless, affirmed the judgment. *Stewart* v. *State*, 1961, 233 Ark. 458, 345 S.W. 2d 472. It held specifically, p. 475, that "the evidence fails to show a systematic inclusion of Negroes on jury panels which would amount to discrimination" and that it was therefore unnecessary to pass upon the argument that systematic inclusion was a denial of due process and equal protection of the law under the Fourteenth Amendment of the Constitution of the United States. Certiorari was denied by the United States Supreme Court, *Stewart* v. *Arkansas*, 1961, 368 U.S. 935, with Mr. Justice Douglas in dissent.

Stewart then filed his application for a writ of habeas corpus with the United States District Court for the Eastern District of Arkansas. He urged there, among other things that members of his race were systematically limited and discriminated against in the selection of the panel for the petit jury which convicted him and that the First Division jury commissioners allowed race to be considered as a factor in selecting the panel and made no special effort to acquaint themselves with Negroes who were qualified for jury service. The district court felt

that there was little significant distinction factually between the Stewart record then made before it and that in our Pulaski County case of *Bailey* v. *Henslee*, 8 Cir., 1961 287 F.2d 936, cert. den. 368 U. S. 877, and, with an expression of some reluctance, came to the conclusion that the jury selection procedure followed for Stewart's trial "does not measure up to the standards of the equal protection clause of the Fourteenth Amendment as interpreted by the United States Supreme Court". 206 F.Supp. 137, 141. The order now appealed from was then entered.

We emphasize initially here, as we did in *Bailey*, p. 939 of 287 F.2d, and as we had already done once before in an earlier appeal in that case, *Bailey* v. *Henslee*, 8 Cir., 1959, 264 F.2d 744, 746, cert. den. 361 U.S. 945, that the question of Stewart's guilt is not now before us. This aspect of his problem has been discussed by the Arkansas Supreme Court in *Stewart* v. *State*, supra, pp. 473-74 of 345 S.W.2d. Here again, as was the situation in the second Bailey appeal, supra, the only issue which confronts us is whether Stewart's federal constitutional rights were preserved in the jury selection process. If they were not and if the district court's order is to be affirmed, the question of Stewart's guilt will be determined in due course at the retrial in state court upon the evidence then presented.

We also emphasize that here, as in *Bailey*, p. 945 of 287 F.2d, there is no question of complete exclusion of Negroes from the regular jury panels in the Pulaski County First Division for some years. The question, instead, is one directed to limitation of Negroes in the selection process.

We agree with the trial court that *Bailey* v. *Henslee* controls this case and that our conclusion there to the effect that prima facie case of selection limitation was

established and was not rebutted by the State compels Stewart's retrial here. Judge Young's detailed opinion at 206 F.Supp. 137 sets forth the factors this court stressed in *Bailey* and draws the manifest parallel between those factors and the jury selection features present here.

We need not repeat at length what Judge Young cogently spelled out in his opinion. It suffices to note that this record discloses, as did *Bailey*: (1) The absence of Negro names from the First Division's panel of alternates continuously from 1952 through the March 1960 term. (2) The presence during the same period of never more than three Negro names in any regular panel of twenty-four. (3) Repetition in the names of Negroes on the panels from 1953 to 1960. (4) The jury commissioners' carry-over of race identification to the jury lists. Specification of color on poll tax records is required by Ark. Stats. § 3-227. The payment of a poll tax is a prerequisite for voting. § 3-104.2. Petit jurors are selected from among the electors. § 39-208.

This record of course also reveals facts which are somewhat different from the record in *Bailey* (1) The presence of three Negro names on Stewart's special panel of 50, with one of these five, however, also among the three on the regular panel. (2) The absence of proof as to the racial composition of jury panels in the Second and Third Divisions which try only civil cases in the Pulaski Circuit Court. (3) The apparent immateriality here of the composition of the March 1956 First Division special panels. (4) The presence of perhaps somewhat more helpful testimony from two jury commissioners.

The Superintendent stresses:

1. The "lack of proof of the composition of the Pulaski Civil Division juries". This factor, however, was obviously no more than a minor one in *Bailey* for our allusion to it there was only "for what atmosphere it may provide". The district court in the present case, although mentioning it, gives the factor no great emphasis. In any event, the appellant does not deny the fact of the complete exclusion of Negro names from all panels of the Pulaski County Civil Divisions since 1939, as established in *Bailey*, p. 946 of 287 F.2d, and we have no hesitancy in taking judicial notice of that fact. Our conclusion would be no different were this factor absent. We note, incidentally, that the possible transfer of jurors between the civil divisions and the criminal division of the Pulaski County Circuit Court has now been terminated as of August 30, 1961. Acts 1961 (1st Ex. Sess.) No. 3, amending Ark. Stats. §§ 22-326.4 to 22-326.6, inclusive.

2. The "absence of proof of the number of poll tax sold by the Pulaski County collector with the designation 'c' ". The district court, however, noted that the evidence showed that from 1953 through March 1960 three Negro names appeared on the regular panel of 24 persons on six of 15 occasions, that this ratio was never exceeded, and that none appeared in 1952. The county collector himself characterized as a guess his testimony as to the race ratio poll tax figures for 1959 which would enter into the qualification of jurors for the March 1960 term.[2]

[2] "• • • all poll tax requests coming in my mail are all written, unless otherwise designated, with a "w", because we have no way of knowing who is white and who is black, and so in order to keep from offending a white person by putting a "c" by their name or offending a colored person by putting a "w" by his name we put a "w" all the way through. The practice in my office for the last 15 years I have been employed there is that in most instances, there are some exceptions, a colored person would be less apt to be offended if there is a "w" by his name than a white person if we had a

No objection to this guess testimony was noted. Its lack of substance was recognized by the district court. The important facts, however, are the evident top proportion of one in eight its appearance 40% of the time, and its lesser statu than one in six which the appellant attributes to "late reliable information" which "was superior and to be preferred".

3. The presence of five Negro names among the 50 comprising the March 1960 special panel. One of these, however, is D. B. Lacefield who also was named to the regular panel. No explanation for this repetition is offered. Lacefield's name, furthermore, is one of those the repetitious use of which was observed and questioned in *Bailey*, pp. 946-47 of 287 F.2d.

4. The testimony of the jury commissioners which appellant says "convey a sincere, honest, and dedicated effort to be absolutely fair and impartial in the composition of the jury". There was testimony that the commissioners used the city directory as well as the poll tax records. One of the commissioners referred to Negroes he knew personally other than those finally selected to serve on the jury. Two commissioners (of the three who served, Ark. Stats. §39-201) testified. Portions of that testimony are set forth in the margin.[3]

"c" by his name. So there is no accurate way of determining the poll tax or the total number or percentage issued to colored or white in one year.

* * * *

"* * * this is a definite fact — last year the colored people bought more poll taxes than they have ever purchased in the history of Pulaski County, so, you cannot make a fair estimate of last year and the year before. They made an effort to buy more — you know that. * * *"

[3] Commissioner Edward Granoff:

"I seek to select persons who would make good jurors * * * We tried to get the better type people — we tried to get the ones we knew something about. * * * We tried to select the people that would be the best qualified and we spent quite a bit of time on selecting the jury. There was no special investigation.

Q. As one of the jury commissioners, Mr. Granoff, was it

We note the emphasis there on proportionate representation. This concept is referred to in *Bailey* v. *Henslee*, supra, p. 942 of 287 F. 2d and cases cited.

Although there are these differences, as is certainly to be expected, between this record and the *Bailey* record, we are forced to conclude, as did Judge Young, that the differences are not sufficient for us to reach a conclusion contrary to that reached in *Bailey*. There, pp.941-45 of 287 F.2d, we reviewed in some detail the principles attendant upon constitutional jury selection. These principles have been enunciated by the Supreme Court of the United States and they bind this court. We noted four Supreme Court cases which are particularly pertinent, *Morris V. Alabama*, 1935, 294 U.S. 587; *Smith* v. *Texas*, 1940, 311 U.S. 128; *Avery* v. *Georgia*, 1953, 345 U.S. 559; *Eubanks* v. *Louisiana*, 1958, 356 U.S. 584. We noted, too, p. 943, that the Supreme Court of Arkansas has frequently referred to and followed these principles in opinions both affirming and reversing state criminal convictions. We then observed, citing Supreme Court cases, that

> "Although the question whether racial discrimination exists has been said to be a question of fact, this does not relieve a federal court of the duty to make independent inquiry and to determine whether a federal right has been denied."

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not the intention and plan of the jury commissioners to select three negroes so as to give the negroes their proportionate representation?

A. We wanted to have some on there so they would have a say in the government of our county.

Q. You wanted to give them a proportionate part?

A. Sure.

Q. You knew that the regular jury panel might be used to try some negroes and you thought it would be fair to have three negroes on the regular panel, is that correct?

A. That's right, not only in trying negroes but to use them in trying white people too.

Q. You wanted them to have proportionate representation?

With these principles in mind we concluded on the record before us, as we did on the *Bailey* record, p. 947 of 287 F.2d:

> "The foregoing facts, taken in the aggregate, lead us to the conclusion that a prima facie case of limitation of members of the Negro race in the selection of this defendant's petit jury panel was established, [and] that the State did not rebut it * * * Here there appears to be a definite pattern of race selection; here there is a device for race identification with its possibility of abuse; here there is exclusion from the alternate panels * * *; here there is an element of recurrence of the same Negro names; and here there is the additional factor, for what atmosphere it may provide, of exclusion from the civil divisions' panels."

This court, after the appeal had been perfected, and upon the Superintendent's application, granted the State of Arkansas time to April 12, 1963, in which to retry Stewart. *Hunter Douglas Corp.* v. *Lando Products, Inc.*, 9 Cir. 1956, 235 F.2d 631, 632-33. It is possible that the appellant will seek review of our judgment by a petition for certiorari to the United States Supreme Court. We assume that if any such application is made it will be affected prior to the issuance of our mandate or that a stay of mandate will be sought as is contemplated by our Rule 16(c). If this is done, any complication such as

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A. That's right.

* * * *

Q. Are you a member of some church?
A. Yes, two.
Q. Which Church?
A. The First Lutheran, and the Jewish Temple up here. I belong to the minority group too, so I don't pick on any of them."

* * * *

Commissioner Jack L. Branch:

"Q. Mr. Branch, you heard Mr. Granoff testify?
A. That's right.
Q. As one of the Jury Commissioners, you, too, thought that the negroes should have representation on the jury?
A. That's right.

that presented in *Bailey* v. *Henslee*, 8 Cir., November 20, 1962, ... F.2d ....., will be avoided. Accordingly, the Superintendent and the State are now granted still further time in which to retry Stewart to and including the expiration of one hundred twenty (120) days from the date of the filing of this court's mandate with the United States District Court for the Eastern District of Arkansas. If this amount of time is deemed then to be unreasonably short, any application by either party for additional time will be directed to the district court.

Affirmed.

A true copy:

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Q. And in thinking that, you sought to give them three negroes on the regular panel?
A. Three or six. We worked from 10.00 o'clock in the morning until 5:00.
Q. On the regular panel you picked three?
A. That's right.
Q. In proportion to their proportionate part of the poll tax holders of this county, do you substantially agree with Mr. Granoff's testimony?
A. Yes, I do.

* * * * *

Q. Mr. Branch, the question was asked if you apportioned the negroes that were placed on the regular panel and I took it from Mr. Granoff's testimony that you all didn't have any figures and you don't know what the proportion would be?
A. We picked enough so they could represent the county government.
Q. You wanted to put some negroes on the jury and you checked the poll book and you ended up with three?
A. I know we worked from 10:00 o'clock to 6:00.
Q. You all made a special effort to see that there were some negroes on there?
A. That's right."